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IN THE
Supreme Court of the United States

KARLA PIERCE, *in her official capacity as Secretary, Kansas Department of Revenue*,
Petitioner,

v.

SAC AND FOX NATION OF MISSOURI, IOWA TRIBE OF KANSAS AND NEBRASKA, AND THE KICKAPOO TRIBE OF INDIANS, OF THE KICKAPOO RESERVATION IN KANSAS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1362, a general jurisdictional statute for federal suits brought by Indian Tribes, abrogates the States' Eleventh Amendment immunity?

2. Whether an Indian Tribe has standing to challenge a state tax when the legal incidence of the tax does not fall on the Tribe or its members, and the Tribe has no responsibility for administering or collecting the tax?

3. Whether the *Ex Parte Young* doctrine applies when an Indian Tribe challenges a general state tax?

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OPINIONS BELOW

The May 30, 2000, decision of the United States Court of Appeals for the Tenth Circuit is reported at 213 F.3d 566, and is included in the petition appendix. The six prior decisions of the District Court are reported at 45 F. Supp. 2d 859, 31 F. Supp. 2d 1298, 993 F. Supp. 1374, 979 F. Supp. 1350, 946 F. Supp. 884, and 905 F. Supp. 904. These decisions are all included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision in this case on May 30, 2000, and denied a timely petition for rehearing and rehearing en banc on July 14, 2000. This petition has been filed within ninety days of that date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Indian Commerce Clause of Article I provides that

> "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The Eleventh Amendment to the Constitution provides that

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

28 U.S.C. § 1362 provides that

> "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a

governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

STATEMENT

1. *Nature of the Suit*. Kansas imposes a tax on the distribution of motor fuel to retailers within the State. *See* Kan. Stat. Ann. § 79-3408(a). Distributors, not retailers, are responsible for remitting the tax to the State. *Id.* § 79-3408(c). When the Kansas Department of Revenue announced its intention to collect the tax on motor fuel distributions to retail gasoline stations on Indian trust lands within Kansas, the respondents (all federally-recognized tribes) filed suit in federal court. The tribes sought declaratory and injunctive relief against the Secretary of the Kansas Department of Revenue, in an official capacity. The tribes invoked the court's jurisdiction under 28 U.S.C. §§ 1331, 1362, and 1367.

2. *The District Court Proceedings*. The District Court issued a temporary restraining order, Petition Appendix ("Pet. App.") 84a-92a, and then a preliminary injunction. Pet. App. 74a-83a. The District Court next denied both the State's motion to dismiss the suit, Pet. App. 67a-73a, and the State's motion for reconsideration. Pet. App. 62a-66a. The District Court ultimately granted summary judgment to the tribes, Pet. App. 43a-61a, and denied the State's motion for reconsideration. Pet. App. 37a-42a.

In making these rulings, the District Court held that the Tribes have standing to maintain the suit, Pet. App. 40a, 47a-48a, that the Eleventh Amendment does not bar the suit, Pet. App. 39a, 70-73a, that the *Ex Parte Young*, 209 U.S. 123 (1908), doctrine applies to permit injunctive relief against the Kansas Secretary of Revenue, Pet. App. 39a, 70-73a, and that on the merits Kansas is precluded from collecting the tax because, although the legal incidence of the tax falls on the

distributors—and not the tribal retailers—the balance of tribal and state interests favors the tribes. Pet. App. 59a-60a.

3. *The Tenth Circuit's Decision.* The Tenth Circuit affirmed the District Court's jurisdictional holdings: (1) that the Eleventh Amendment does not bar the tribes' suit, Pet. App. 6a-10a; and (2) that the tribes have standing to bring the suit, Pet. App. 11a-15a. The Circuit concluded, however, that on the merits the District Court had not properly balanced the interests at stake. Pet. App. 30a-36a. Therefore, the Tenth Circuit remanded for further proceedings on the merits. Pet. App. 36a.

a. *The Eleventh Amendment.* The Tenth Circuit began its Eleventh Amendment analysis by stating several propositions of Eleventh Amendment jurisprudence derived from the Court's decision in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). These propositions include that the Eleventh Amendment applies to suits by Indian tribes against states, Pet. App. 7a, and that 28 U.S.C. § 1362 (which gives federal courts general jurisdiction over suits involving Indian tribes and federal law) does not operate "as a general waiver of a state's sovereign immunity." Pet. App. 7a.

The Tenth Circuit then focused on the Court's decision in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), which permitted a federal suit by a tribe seeking to enjoin the collection of a Montana tax on cigarette sales on tribal lands in spite of the Tax Injunction Act, 28 U.S.C. § 1341. The Tenth Circuit opined that the *Moe* "Court concluded that because § 1341 would not bar the United States from seeking to enjoin enforcement of the state tax law on the tribe's behalf, the tribe itself could maintain its suit against the state." Pet. App. 9a. Thus, Tenth Circuit declared that

> *Moe* leads us to conclude that we have jurisdiction under 28 U.S.C. § 1362 to reach the merits of this case. Surely if an Indian tribe may maintain a suit on its own behalf in

> federal court to enjoin collection of a state's cigarette sales tax, it may maintain a similar suit on its own behalf to enjoin collection of a state's motor fuel distribution tax. Neither the Tax Injunction Act nor the Eleventh Amendment bars the Tribes' suit in this case.

Pet. App. 9a-10a.

Reading the Court's later decision in *Blatchford* as consistent with its holding, Pet. App. 10a, the Tenth Circuit concluded "that the Eleventh Amendment does not bar the Tribes' suit against the State to enjoin enforcement of the Kansas motor fuel tax law." *Id.* Because it found the Eleventh Amendment inapplicable to the tribes' suit, the Tenth Circuit declined to address whether the tribes could maintain an *Ex Parte Young* suit against the Kansas Secretary of Revenue in her official capacity. Pet. App. 10a n.3.

b. *Standing*. The Tenth Circuit also addressed the State's argument that the tribes lack standing to maintain this suit because the legal incidence of the tax falls on distributors and the tribes have no role in collecting or remitting the tax. The court began its analysis by stating general standing principles, both constitutional and prudential. Pet. App. 11a-12a. The Tenth Circuit had "little difficulty concluding that the Tribes in this case have constitutional standing", Pet. App. 12a, because the tribes, in the court's view, alleged injury in fact (an economic effect) traceable to the State's desire to tax that likely would be redressed if the tax were enjoined. Pet. App. 12a.

The Tenth Circuit likewise concluded that "prudential standing principles do not bar our exercise of jurisdiction in this case." Pet. App. 12a. First, because the tribes asserted a right to be free of the cost of the tax, the court concluded that the tribes' claims are not "a 'generalized grievance' shared by all retailers to whom the distributors pass the cost of the tax." Pet. App. 13a.

Second, the Tenth Circuit essentially concluded that the tribes' standing is intertwined with, and thus inseparable from, the merits of the case. Relying primarily on the Court's decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), the Tenth Circuit opined that "regardless of where the legal incidence of the motor fuel tax falls, the Tribes at the very least have a particularized claim of injury . . . with respect to the tax sufficient to confer standing upon them." Pet. App. 13a. Further relying upon "the United States' interest in securing immunity to the Indians from state taxation which threatens Indian tribes' unique status," Pet. App. 14a, the Tenth Circuit effectively concluded that "the economic interests which the Tribes seek to protect by enjoining the application of the State's motor fuel tax," Pet. App. 14a, automatically confers standing on the tribes. Pet. App. 14a-15a.

In a portion of the opinion not relevant to this petition, the Tenth Circuit then went on to address the merits of the tribes' claims. Pet. App. 15a-36a.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision That 28 U.S.C. § 1362 Abrogates The States' Eleventh Amendment Immunity Is Contrary To This Court's Decisions In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), And *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

This Court has plainly held that (1) the Eleventh Amendment applies to suits by Indian tribes against states in federal court, *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), (2) Congress's power over Indian commerce does not give it the authority to abrogate the States' immunity, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and (3) 28 U.S.C. § 1362 is not an abrogation of the

States' Eleventh Amendment immunity, either in general nor in any particular instance. *Blatchford*, 501 U.S. at 782-88. In direct contravention of these clear decisions, the Tenth Circuit held in this case that the tribes' suit is not subject to Eleventh Amendment restrictions.[1]

Focusing on the general grant of jurisdiction in 28 U.S.C. § 1362 for suits by tribes arising under federal law, and the Court's decision in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the Tenth Circuit acknowledged that this Court "rejected the notion that 28 U.S.C. § 1362 operated as a general waiver of a state's sovereign immunity." Pet. App. 7a. Nonetheless, the Tenth Circuit opined that, because the Court in *Moe* held that § 1362 creates an exception to the Tax Injunction Act (28 U.S.C. § 1341) in favor of Indian tribes, and because the United States (as trustee) could have sued on the tribe's behalf in *Moe*, "we conclude that the Eleventh Amendment does not bar the Tribes' suit against the State to enjoin enforcement of the Kansas motor fuel tax law." Pet. App. 10a.

The Tenth Circuit's analysis and holding are wrong and insupportable. Indeed, the Tenth Circuit's error is so manifest and creates such significant, potential adverse consequences for the States that summary reversal may be warranted. This Court's decision in *Blatchford* expressly rejected the reasoning on which the Tenth Circuit relied in this case, as well as the Tenth Circuit's holding.

The Court's discussion of the Eleventh Amendment issues in *Blatchford* began by stating the tribes' first argument as follows:

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[1] Importantly, the States' Eleventh Amendment immunity is an immunity from suit, not just a defense to liability. Thus, if the immunity applies, the suit should be dismissed at the outset. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

> Relying upon our decision in *Moe*, respondents [the tribes] argue that we have read § 1362 to embody a general delegation of the authority to sue on the tribes' behalf from the Federal Government back to tribes themselves. Hence, respondents suggest, because the United States would face no sovereign immunity limitation, in no case brought under § 1362 can sovereign immunity be a bar.

501 U.S. at 783. Similarly, in this case, the Tenth Circuit argued that

> In *Moe*, the Court concluded that because § 1341 [the Tax Injunction Act] would not bar the United States from seeking to enjoin enforcement of the state tax law on the tribe's behalf, the tribe itself could maintain its suit against the state.

Pet. App. 9a.

But this Court in *Blatchford* made clear that § 1362, *at most*, created an exception to the general policy represented by the Tax Injunction Act. "*Moe* did not purport to be saying that § 1362 equated tribal access [to federal court in suits against the States] with the United States' access generally . . . ." 501 U.S. at 784. Indeed, the Court emphasized that § 1362 does not overcome the States' Eleventh Amendment immunity which, unlike the Tax Injunction Act, "is a creation not of Congress but of the Constitution." 501 U.S. at 785.

The Court in a footnote further rejected as follows any argument that *Moe* holds that § 1362 abrogates sovereign immunity:

> Respondents [the tribes] argue that since the plaintiffs in *Moe* named the State of Montana as a defendant, as well as individual officers, the decision in that case held that § 1362 eliminated not only the statutory bar of § 1341, but sovereign immunity as well. *We think not.*

> Since Montana had not objected in this Court on sovereign immunity grounds, its immunity had been waived and was not at issue.

501 U.S. at 785 n.3 (emphasis added; internal citations omitted).

The Court in *Blatchford* then proceeded to conclude that, in any event, § 1362 does not satisfy the "clear statement" requirement for congressional abrogation of state sovereign immunity and the Court questioned whether Congress had the power to abrogate state sovereign immunity in § 1362 (which *Seminole Tribe* later makes plain that it does not). 501 U.S. at 786-88.

Thus, the Tenth Circuit seriously misread the Court's decisions in *Moe* and *Blatchford*. Indeed, the Court's decision in *Blatchford* could not be more clear that *Moe* does not stand for the proposition on which the Tenth Circuit relied. Nor did *Moe* actually raise or address the Eleventh Amendment issue presented in this case.

Moreover, the Tenth Circuit's holding runs directly contrary to this Court's recent decisions in *Seminole Tribe* and *Coeur d'Alene*, both of which make clear that the Eleventh Amendment applies with full force to federal court suits brought by Indian tribes against states. *Seminole Tribe* further makes clear that Congress lacks authority under Article I to abrogate the States' immunity, and there is no claim here that 28 U.S.C. § 1362 is based in any way on Congress's power under section five of the Fourteenth Amendment. *Cf. Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Other circuits have already recognized the flaws in the Tenth Circuit's reasoning:

> Although we agree with the result in *Sac & Fox* [on *Ex Parte Young* grounds], we believe that the question of whether the Eleventh Amendment bars a tribe's state tax

> challenge brought under § 1362 cannot be answered without considering *Coeur d'Alene* and the new twist it puts on Eleventh Amendment analysis, nor do we believe that *Moe* addressed the Eleventh Amendment issue.

Agua Caliente Band v. Hardin, No. 99-55251, 2000 WL 1277302, at *7 n.8 (9th Cir. Sept. 11, 2000).

The Tenth Circuit's erroneous Eleventh Amendment holding is significant as a practical matter. If any suit by a tribe under § 1362 involving state taxation is not subject to the Eleventh Amendment, then presumably tribes may seek to bring all sorts of tax-related claims for money directly against States in federal court. That result flies in the face of the Court's holdings in *Blatchford*, *Seminole Tribe*, and *Coeur d'Alene*, and creates the potential for substantial direct attacks on the state treasury. Under the Tenth Circuit's reasoning, tribes need not resort to an *Ex Parte Young* action when challenging state taxes (see Part III below). Presumably, the result is that the relief available may not be restricted to injunctive and declaratory measures.

Thus, correcting the Tenth Circuit's error in this case is not just a nicety of legal reasoning, but a practical necessity. Kansas respectfully requests that the Court either summarily reverse or grant plenary review of the Tenth Circuit's erroneous Eleventh Amendment holding.

II. The Tenth Circuit's Decision That The Tribes Have Standing To Challenge The Kansas Tax Is Wrong And Conflicts With The Decision Of At Least One State Court Of Last Resort.

The Tenth Circuit's decision that the tribes have standing to challenge the Kansas gasoline tax on distributors because the tribes must either absorb the higher costs of fuel from distributors or pass the costs on to the tribes' retail purchasers is wrong and in conflict with the decision of at least one state court of last resort. Effectively, the Tenth Circuit adopted a

per se rule of standing for tribes in cases involving state taxes. Indeed, the court reasoned that, because state taxes have an economic effect on tribes and the United States has an interest in securing the tribes' immunity from improper state taxation, *any* tribal suit challenging a state tax must be resolved *on the merits*. Pet. App. 13a-15a.

But in fact, all of the cases on which the Tenth Circuit and the District Court relied to find standing are distinguishable from this case in important respects. Cases like *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), involve either (1) state regulation of activity occurring on tribal land or (2) a requirement that tribes collect and remit taxes to the State, or (3) both. In this case, by contrast, the only connection of the Kansas tax to the tribes and tribal lands is that some distributors sell motor fuel to tribal retailers and may charge those retailers higher prices because of the tax. The State is neither regulating activity on tribal lands, nor requiring the tribes to collect and remit taxes to the State.

Standing has two components: constitutional requirements and prudential considerations. Constitutional requirements are that the plaintiff allege (1) a concrete and particularized actual or imminent injury, (2) which is fairly traceable to the defendant's conduct and (3) which a favorable court decision will redress. *See, e.g., Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663-64 (1993). Prudential considerations include whether a plaintiff is asserting its own rights or those of third parties and whether the plaintiff is asserting a "generalized grievance." *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975).[2]

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[2] Standing, like Eleventh Amendment immunity, is in essence a subject matter jurisdictional inquiry. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is

(continued...)

In this case, the District Court correctly determined—and the Tenth Circuit did not dispute—that the legal incidence of the Kansas tax at issue falls on non-Indian distributors located off Indian lands, rather than on the tribes or their members. Pet. App. 52a-59a. Indeed, no other conclusion seems possible here, given that the tax is not imposed on any activity occurring on tribal lands and the tribal retailers are not required to collect or remit the tax to the State. At least one state supreme court, unlike the Tenth Circuit, has held that such a finding compels the conclusion that a tribe lacks standing to challenge the tax.

In *Carter v. Montanan Department of Revenue*, 274 Mont. 33, 905 P.2d 1102 (1995), *cert. denied*, 517 U.S. 1188 (1996), the Montana Supreme Court, relying on federal precedent, concluded that a tribe lacked standing in circumstances identical to those presented in this case. Relying on federal precedent, the court pointed out that "[t]he concept of legal incidence differs from the question of where the economic burden falls." 274 Mont. at 42. The court then held that the plaintiff (a gasoline retailer who operated on a reservation) was not personally aggrieved by a state gasoline tax on distributors and therefore lacked standing to sue. *Id.* at 43.

The Tenth Circuit's contrary conclusion opens the door to a host of tribal challenges to state taxes that are not imposed on tribes but that directly affect non-Indians who do business with tribes. For instance, an increase in gasoline distributors' state property, sales or income taxes also is likely to result in an increase in the price that distributors charge for their gasoline. Because the tribal retailers will pay higher prices for their gasoline as a result, the Tenth Circuit's reasoning suggests that the tribes might have standing to challenge these

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[2] (...continued)
entitled to have the court decide the merits of the dispute or of particular issues").

other taxes, the legal incidence of which clearly falls upon distributors. The chaos that could result from following the Tenth Circuit's reasoning is manifest.

Transient economic burdens do not determine the legal incidence of a tax, as this Court has made clear. *See, e.g., Gurley v. Rhoden*, 421 U.S. 200, 204-05 (1975) ("The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. Therefore, the decision as to where the legal incidence of either tax falls is not determined by the fact that petitioner, by increasing his pump prices in the amounts of the taxes, shifted the economic burden of the taxes from himself to the purchaser-consumer."). But the legal incidence of the tax should, in general, determine who has standing to challenge the tax.

This analysis is consistent with the Court's decision in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), on which both the Tenth Circuit and the District Court relied to find standing in this case. *Chickasaw Nation*, unlike this case, involved an Oklahoma fuels tax that was "levied on retailers, not on distributors or consumers." 515 U.S. at 455. Thus, completely unlike this case, the tribes in *Chickasaw Nation* were required to collect and remit the tax to the state of Oklahoma. The Court in *Chickasaw Nation* did no more than recognize that tribes may have standing to challenge state taxes the legal incidence of which falls on non-Indians, but which at the same time impose legal obligations and responsibilities on the tribes. Thus, the Court cited several cases as examples, all of which involve either state regulation of activity occurring on tribal lands or state requirements that tribes collect and remit taxes to the state.[3] 515 U.S. at 458-59.

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[3] *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (state's attempt to regulate on-reservation high stakes bingo

(continued...)

The Court did not purport to create a rule that tribes always have standing to challenge *any* state tax that may have some economic impact on tribes.

The Tenth Circuit's approach effectively creates the potential for tribal consumer and purchaser standing to challenge any state taxes on manufacturers, distributors or retailers. Neither logic nor precedent support that result.

III. Whether The *Ex Parte Young* Doctrine Applies To Suits By Tribes Challenging State Taxes—A Core Sovereign Interest Of The States—Is An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

Because of its erroneous Eleventh Amendment holding, the Tenth Circuit left open the important *Ex Parte Young* issue that this case raises.[4] Kansas requests that the Court also consider the *Ex Parte Young* issue, namely whether injunctive relief against a state official sued in her official capacity should be available in this case.

The scope and extent of the *Ex Parte Young* doctrine in the context of tribal suits for injunctive relief against state officials is currently unsettled. This Court held, in both *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and

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[3] (...continued)
operation); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980) (state's attempt to tax on-reservation cigarette sales to non-Indians); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976) (state's attempt to require tribal sellers to collect cigarette tax on sales to non-Indians).

[4] "The district court relied on the legal fiction established in *Ex Parte Young* to overcome the State's claim of sovereign immunity. * * * Because we conclude that we have jurisdiction to reach the merits of this case under 28 U.S.C. § 1362, we decline to address the question of *Ex Parte Young*'s application to matters of state taxation affecting Indian tribes." Pet. App. 10a n.3 (internal citations omitted).

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997), that such relief was not available in the circumstances presented in those cases. In *Seminole Tribe*, the Court found the existence of a federal statutory remedial scheme for resolving Indian gaming disputes precluded resort to *Ex Parte Young* relief. In *Coeur d'Alene*, the Court determined that *Ex Parte Young* relief was not appropriate when the core state sovereignty interests inherent in a dispute involving jurisdiction over land within a State's borders were at issue. In neither case, however, did a majority of the Court purport to establish general rules regarding the scope of the *Ex Parte Young* doctrine.

This case involves factors similar to both *Seminole Tribe* and *Coeur d'Alene*. Indeed, the Tax Injunction Act, 28 U.S.C. § 1341, is nothing less than a strong and clear federal recognition (of long standing) that state taxation involves unique and inherent state sovereign interests that generally should be resolved in state, not federal, court.[5] *See, e.g., Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981).

Although the tribes here have followed the formalism of naming the Secretary of the Kansas Department of Revenue in her official capacity, there can be no mistake that this is a suit against the State of Kansas. And the Court has made clear that "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." *Coeur d'Alene*, 521 U.S. at 270 (plurality opinion).

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[5] This Court has, however, often permitted tribes to challenge state taxes in federal court, in spite of the prohibition of 28 U.S.C. § 1341 (the Tax Injunction Act). That, in fact, *is* the actual holding of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976): that § 1362 made an exception to § 1341 for tribes, giving them "access to federal court for the purpose of obtaining injunctive relief from state taxation." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 784 (1991).

Instead, federal courts must carefully consider the respective state and federal interests in these circumstances. Where a particular category of suits—like those challenging a state tax—implicates a state's core sovereign interests, the Eleventh Amendment may shield a state from suit in federal court, notwithstanding a plaintiff's effort to invoke the *Ex Parte Young* doctrine. The mere fact that a suit names state officials, rather than the state as an entity, does not alter the fact that many such suits may have a direct and substantial impact on the State itself. That is one lesson of both *Seminole Tribe* and *Coeur d'Alene*.

Indeed, the Court has recently recognized that "there are, in general, two instances where *Young* has been applied." *Coeur d'Alene*, 521 U.S. at 270 (plurality opinion). "The first is where there is no state forum available to vindicate federal interests . . . ." *Id.* Although this is an important application of the *Young* doctrine, it has no relevance to this case. Kansas provides a legitimate state forum for the tribes, and they can make no serious claim to the contrary.

"[A] second instance in which *Young* may serve an important interest is when the case calls for the interpretation of federal law." *Coeur d'Alene*, 521 U.S. at 274. This reasoning, however, threatens to turn an exception to Eleventh Amendment immunity into the general rule, as the Court recognized in *Coeur d'Alene*. Thus, the Court's "recent cases illustrate a careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case." *Id.* at 278.

Taxation is a core sovereign interest of the States, not unlike the States' core sovereign interest in exercising jurisdiction over land within their boundaries. The Court should consider whether the *Ex Parte Young* doctrine applies in cases such as this one, where the real effect of the tribes' suit is to preclude the collection of a validly enacted state tax—not even imposed on the tribes and not even requiring their

assistance in collecting it—thereby depriving the state of substantial tax revenue that it would otherwise collect. *Cf. Agua Caliente Band v. Hardin*, No. 99-55251, 2000 WL 1277302 (9th Cir. Sept. 11, 2000) (acknowledging that taxation is a core state sovereignty interest but concluding that *Coeur d'Alene* recognizes only a "unique, narrow exception" not applicable to tribes' suits challenging state taxes).

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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